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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. .....

PAINTERS DISTRICT COUNCIL NO. 6,
BROTHERHOOD OF PAINTERS, DECORATORS AND
PAPERHANGERS OF AMERICA, AFL,

and

FURNITURE FINISHERS LOCAL UNION 725,
BROTHERHOOD OF PAINTERS, DECORATORS AND
PAPERHANGERS OF AMERICA, AFL,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Sixth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Painters District Council No. 6, and Furniture Finishers Local Union 725, both affiliated with the Brotherhood of Painters, Decorators and Paperhangers of America, AFL, pray that a writ of certiorari issue to review the Decree of the United States Circuit Court of Appeals for the Sixth Circuit, entered on March 2, 1953, upholding the order of the National Labor Relations Board of December 28, 1951.

OPINIONS BELOW.

The court below rendered no opinion other than the said Decree of March 2, 1953 (R. 363). The findings of fact, conclusions of law and order of the National Labor Relations Board appear at R. 61 and are reported at 97 N. L. R. B. 654. The Trial Examiner's Intermediate Report on which the Board based its order is at R. 33.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (28 U. S. C. A. Section 1254) and Section 262 of the Judicial Code (28 U. S. C. A. Section 1651) and under Section 10 (e) of the National Labor Relations Act, as amended, and Section 10 (e) of the Administrative Procedure Act.

QUESTIONS PRESENTED.

1. Whether the court below by upholding the Board's finding, that an unknown person was an agent of a union for the commission of unfair labor practices, failed to apply the law of agency as required by the National Labor Relations Act as amended and grossly misapplied the standard for review of Board decisions required by this Court.

(2) Whether the court below by upholding the Board's finding that a local union was the agent of a federation of unions for the commission of unfair labor practices failed to apply the law of agency as required by the National Labor Relations Act as amended and grossly misapplied the standard for review of Board decisions required by this Court.

STATUTES INVOLVED.

The pertinent provisions of the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. A. 151 *et seq.*, as amended by the Labor Management Relations Act, 1947, Public Law 101, 80th Cong., 1st Session, Chap. 120 (29 U. S. C. A. Section 151 *et seq.*), and of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. A. Supp. Section 1001 *et seq.*), are set forth in the Appendices I and II, respectively, *infra*, pp. 27 to 30.

STATEMENT OF MATTERS INVOLVED.

Complaint was issued against the petitioners in April, 1951, concerning a one day strike occurring in July 1950. Hearing was held in Cleveland in May, 1951, before a Trial Examiner who issued his Intermediate Report (R. 33) in August, 1951. Thereafter exceptions were filed to said report.

On December 28, 1951, the Board issued its decision and order (R. 61) finding that both petitioners had violated Section 8(b)(1)(A) of the Act by physically assaulting an employee who had instituted a petition to decertify petitioner, Local 725, as bargaining representative of certain employees of the Higbee Company, and by threatening other employees with loss of employment or physical violence to discourage them from renouncing their union affiliation. The Board ordered the petitioners to cease and desist therefrom and to post notices embodying the terms of the Board's order (R. 64).

In July, 1952, the Board petitioned the court below for enforcement of its order. Petitioners contended the Board finding that the assailant of an employee of the Company was an agent of the petitioner, Local 725, was not based on the evidence and that the Trial Examiner

in his Intermediate Report deliberately built up, and actually fabricated, facts in his Intermediate Report to support an agency finding; that an analysis of these findings show the entire element of agency to be missing. The Board contended its order was proper and the court below upheld the Board's order without opinion. For reasons stated below, petitioners assign this holding as error.

Petitioners contended that the Board finding that petitioner, District Council, was responsible for all the actions of petitioner, Local 725, was a complete misapplication of the facts and misconstruction of the rules of agency and that the Local and its business agent were not the agents of the District Council. The Board contended that its order was proper. The court below upheld the Board order and petitioners assign this holding as error.

On March 2, 1953, the court below ordered that a Decree of Enforcement of the Order of the Board of December 28, 1951, be issued. (R. 363.) For reasons stated below, petitioners assign this holding as error.

SPECIFICATION OF ERRORS TO BE URGED.

The court below erred in ordering enforcement of the Board's order:

(1) When it failed to upset the finding that an unknown person was an agent of the union in the commission of unfair labor practices and thus:

(a) failed to apply the law of agency as required by the National Labor Relations Act, as amended, thus rendering a decision in conflict with the decision of another circuit court of appeals, and

(b) failed to apply the standard for review of Board orders required by this Court's decisions.

(2) When it failed to upset the finding that a local union and its business agent were agents of a federation of unions and thus:

(a) failed to apply the law of agency as required by the National Labor Relations Act, as amended, thus rendering a decision in conflict with the decision of another circuit court of appeals, and

(b) failed to apply the standard for review of Board orders required by this Court's decisions.

(3) When it failed to upset the finding that alleged coercive statements and a jostling incident were violations of the National Labor Relations Act and thus failed to apply the standard for review of Board decisions required by this Court's decisions.[1]

REASONS FOR GRANTING THE WRIT.

(1) By upholding the Board order that an unknown assailant was an agent of petitioners, the court below decided an important question of federal law relating to the administration of the National Labor Relations Act, as amended, which has not been, but should be, settled by this Court, and in so doing, the court below rendered a decision in conflict with the decision of another circuit court of appeals. And the court below ignored the standard for review of Board orders required by this Court's decisions.

(a) All unions and employers and the remaining public are directly affected by the activity of parties to a labor dispute. Each party is, and should be, legally and

---

[1] This specification of error is set forth only for saving purposes if this writ is granted. It will not be further mentioned herein. It is error but does not in itself directly affect the public interest.

morally responsible for its agents' activities. Conversely, neither employers nor unions should be held responsible for actions of persons not their agents and a decision of this Court is necessary to dispel the confusion now existing by reason of this decision.

This question of agency is unique as far as the decisions of this Court are concerned in connection with the administration of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947. The amended Act contains a specific provision on agency which has not been before this Court; that provision is as follows:

> "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." [2]

Neither the Trial Examiner, the Board, nor the court below mentioned this provision of the Act,[3] but their determination of this question of agency directly affects the construction of this provision and is detrimental and harmful to unions and employers alike.

The legislative history of this provision shows that it was written in the Act solely because of this Court's decision in *United Brotherhood of Carpenters vs. U. S.*, 330 U. S. 395. That decision construed Section 6 of the Norris-LaGuardia Act,[4] and in no wise applied to the National

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[2] Section 2 (13) Labor Management Relations Act, 29 U. S. C. A. Section 152(13).

[3] The Trial Examiner quoted from another Board decision quoting this provision. (R. 47.)

[4] "47 Stat. 71, 29 U. S. C. A. Section 106—No officer or member of any association or organization and no association or organization participating or interested in a labor dispute, shall be held

(Continued on following page)

Labor Relations Act, but Congress in placing this provision in the Taft-Hartley Act obviously intended to ensure that the Act could never be so construed. Senator Taft, co-author of the amended Act, after Senate and House conferees had agreed on the final bill, explained:

> "This [Sec. 2 (13)] restores the law of agency as it has been developed at common law.
>
> * * * * *
>
> It is true that this definition was written to avoid the construction which the Supreme Court in the recent case of the United States against United Brotherhood of Carpenters placed upon Section 6 of the Norris-LaGuardia Act which exempts organizations from liability for illegal acts committed in labor disputes unless proof of actual instigation, participation, or ratification can be shown. The construction the Supreme Court placed on this special exemption was so broad that Mr. Justice Frankfurter speaking for the dissenting minority, pointed out that all unions need do in the future to escape liability for the illegal action of their officers is simply to pass a standing resolution disclaiming such responsibility. The conferees agreed that the ordinary law of agency should apply to employer and union representatives." 93 Daily Cong. Rec. 7001, June 12, 1947.

Thus the provision of the National Labor Relations Act as amended is a clear instruction that the ordinary law of agency must be applied in determining whether a person is or is not an agent of a union or employer. The Board and the court below did not apply the law of agency in making these determinations of agency herein. None

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(Continued from preceding page)

responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of such acts, or of ratification of such acts after actual knowledge thereof."

of the recognized elements of an agency relationship were found to be present; there were no facts showing the existence of the relationship; no facts showing extent of the asserted agent's authority; no conduct showing intent to confer authority. There was also no showing that the specific illegal act of the asserted agent was authorized or ratified. The only real fact relied upon to establish agency was that an anti-union employee was assaulted and, therefore, such assault *per se* must have been by an agent of the union. If this is proof of agency under the Act, then if a striker is assaulted, the struck company is *per se* guilty of the assault. This is not evidence and places all employers and unions in dangerous and precarious positions where persons not subject to their authority can cause untold damage to their cause. Further, it places a dangerous weapon in the hands of an unscrupulous union or employer to use agent provocateurs to establish legal rights and damage suits against the other party in a labor dispute. This is an important question affecting the administration of the Act and should be decided by this Court.

By upholding the Board order on this question, the court below came in conflict with the decision of the Fifth Circuit Court of Appeals in *N. L. R. B. vs. Russell Manufacturing Company, Incorporated,* 187 F. (2d) 296. There, in a case decided under the National Labor Relations Act (before amendment), the court stated unconditionally that the law of agency must be applied by the Board in determining who are agents of an employer and the Court set forth in detail the elements necessary to prove agency and pointed out how and why the men held by the Board to be agents were not agents under the law of agency.

As Senator Taft said (*supra,* p. 7) "the ordinary law of agency should apply to employers and union rep-

resentatives." Thus the Fifth Circuit holds, prior to amendment, that the law of agency applies to employers. While, despite the amendment "to restore the law of agency," the court below holds in effect that it does not apply to unions.

It is clear from the quotation above that the intent of Congress was that the law of agency applies to both unions and employers, so the decisions of the two circuit courts are in direct conflict on an important question.

(b) The court below also decided a federal question in a way probably in conflict with applicable decisions of this Court, when it ignored the very standard set forth in two recent decisions of this Court, wherein the impact of the Administrative Procedure Act and the amended National Labor Relations Act on court review of Board decisions was interpreted. This Court in these companion cases set forth certain criteria which must be followed by the Board now, in order that its findings be sustained. *Pittsburgh Steamship Company vs. N. L. R. B.*, 340 U. S. 498, *Universal Camera Corporation vs. N. L. R. B.*, 340 U. S. 474.

The Trial Examiner, not having facts in the record upon which to base a finding of agency, misstated, distorted, and misquoted testimony, and even stated actual untruths about the testimony and then made his finding based on his own misstatements, etc. He did not fairly estimate the worth of the testimony, nor did he consider both sides of the case. Yet the Board adopted the Trial Examiner's report.

This Court in the *Universal Camera Corporation* case, *supra*, said "The Board's findings are entitled to respect; but they nonetheless *must* be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on

matters within its special competence or both." (Emphasis ours.) The court below upheld the Board order when it was not so justified. This Court further said in the same decision "[we] will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." This appears to be such a rare instance.

(2) By upholding the Board order that petitioner, Local 725, and its business agent, were the agents of petitioner, District Council, the court below decided an important question of federal law relating to the administration of the National Labor Relations Act, as amended, which has not been, but should be, settled by this Court, thus rendering a decision in conflict with decisions of other circuit courts of appeals. And again the court below failed to apply the standard for review recently set forth by this Court.

(a) This is another question of agency which is unique as far as the decisions of this Court are concerned and which directly affects the public interest. The relationship of a federation of unions to its affiliated members, whether it is the American Federation of Labor, the C.I.O., the Cleveland Federation of Labor, or a national labor union with its hundreds of affiliated locals, or whether, as in this case, the relationship of a District Council, to each of the fourteen local unions affiliated with it, as far as agency is concerned, is of tremendous importance to the administration of the amended Act. The decision herein, holding the District Council liable for the acts of petitioner, Local 725, affects all unions and federations of unions.

As stated in paragraph 1(a) above (p. 6), the law of agency must be applied by the Board in determining whether a person or organization is an agent of a

union or an employer for the commission of unfair labor practices. The Trial Examiner held that Local 725 and the District Council were engaged in a joint venture in the assaulting and other unfair labor practices. The Board upheld the Trial Examiner's finding and then made a further finding that Jones was a direct agent of the District Council and that being business agent of the Local, both the District Council and the Local were responsible for the unfair labor practices.

Neither the finding that Jones was an agent of the District Council, nor that the Local was an agent of the District Council, was based on the law of agency and adding them together does not supply the missing element of agency. The proper application of the law of agency is important in the administration of the Act.

The decision of the Court below upholding the Board order on this point is in conflict with decisions of other circuit courts.

The finding that Jones was a direct agent of the District Council is in conflict with the Fifth Circuit's decision in *N. L. R. B. vs. Russell Manufacturing Company, Inc., supra,* for the same reasons set forth in paragraph 1(a) above (p. 5).

The finding that the Local was an agent of, or in a joint venture with, the District Council is in conflict with the decision of the District of Columbia Court of Appeals in *Di Giorgio Fruit Corporation, etc., vs. N. L. R. B.,* 191 F. (2d) 642, Cert. den. 342 U. S. 869.

(b) The court below also failed to apply the standard set forth in the *Universal Camera Corp.* and the *Pittsburgh Steamship Company* cases, *supra,* in that the Board neither fully estimated the worth of the testimony nor considered both sides of the case.

ARGUMENT.

A. The record does not show the assailant to be an agent of Jones, the Business Agent of the Local, as found by the Board, and the court below failed: (a) to apply the standard of review set forth by this Court in Universal Camera Corporation and Pittsburgh Steamship Company cases, supra; (b) failed to apply the law of agency as required by the Act, and its decision is therefore in conflict with the decision of the Fifth Circuit in N. L. R. B. vs. Russell Manufacturing Company, Inc. supra.

1. The Facts.

The record on the assault discloses the following.

The Company employs eight furniture finishers who were members of the Local (R. 37, 175). Some fifty companies in Cleveland employing furniture finishers, including this Company, have always bargained as an employers group with the Local. In 1950, the employers group, which included this Company, reached an impasse in bargaining negotiations and the Local conducted a general strike against all the companies for twelve weeks (R. 37, 137). The strike was settled July 7th, but when this Company's finishers returned to work, they were told that the Company would not abide by the agreement, except as to wages. The Local told the employees of the Company to return to work for the time being until the matter was ironed out. Soon thereafter, Vitko, one of the Company's furniture finishers, filed a decertification petition against the Local (R. 40). The Local and its Business Agent, Warren Jones, were advised of this.

After two Executive Board meetings of the Local had considered the Company's refusal to agree to the contract all the other companies had agreed to sign, Jones was given

authority by the Local's Executive Board to call a strike when he saw fit and on July 26, he advised the furniture finishers that the Local would picket the warehouse the next morning, July 27th.

Events transpiring on that day, July 27, formed the bases for the findings of the Board which are here in dispute. Jones established the picket line at the warehouse and Vitko was assaulted in a nearby field.

The entire finding of fact by the Trial Examiner on the assault, which the Board upheld, when analyzed, rests on five "facts" found by the Trial Examiner, which either are unproven, or are inferences not based on evidence while one "fact" is based on the discrediting of a witness by unfairly estimating the worth of the testimony. These facts are the bases for concluding that the assault was factually attributable to the Local. The Trial Examiner next rephrases some of the same "facts" in argumentative form to prove the assault was legally attributable to the Local. (The entire legal finding is set forth in Appendix III, p. 31).

The fallacious facts upon which the Trial Examiner bases his finding of fact are (1) that a pattern of conduct of violence was established by a statement in a speech by Jones to the membership of the Local prior to the general strike and relating to the proposed general strike, five months prior to the happenings herein, (2) that Vitko's assailant arrived with Jones, (3) that the assailant was a picket, (4) that the assailant jostled Vitko in Jones' presence and (5) the assailant was not reprimanded by Jones.

These facts are not based upon the evidence.

The first of these facts, the pattern of violence, established by the Board from a speech by Jones to the membership in March, 1950, consists of a statement taken out of context from Vitko's direct testimony which he con-

tradicts and explains away on cross-examination. Following is his testimony on this point:

On Direct Testimony

(R. 78):

"Q. Did Mr. Jones talk at that meeting?

A. At that meeting, yes, he did. At that meeting, he did talk.

Q. What did he say?

A. Well, he come around and said, 'If we go out on strike, we are going to have our men with us to picket and everything else, and we will hire professional pickets for this affair, and if any of us boys want to picket, we are free to go and picket, but if anything comes up, we should just walk right out of the picture, if anything rough or anything comes out of it, our boys that we hire for it will know what to do and how to do it and when to do it, but we should just walk out of the picture, don't do anything'."

On Cross Examination

(R. 105):

"Q. In this third meeting, you mentioned, Jones said something about pickets. Now, will you tell us again what you say he stated?

A. Well, he said when the strike goes he will have professional pickets, and if we fellows want to go and picket, it's all right to go ahead and picket, and if anything comes up at those picket lines, we were to stay clear of anything and leave the professional pickets take care of anything; they know what to do and when to do it.

Q. Did he explain to you that the Labor Board has sanctioned the discharge of employees who get in any sort of scuffle on a picket line?

A. Well, no, I don't remember anything about a thing like that, but he told us to stay clear of all that so that there is no trouble out of that.

Q. Did he say it was so that employees couldn't be accused by the Company of anything that might occur?

A. Well, that's the reason for it.

Q. And he so explained that?

A. That's right."

The above testimony does not establish a pattern of violence, but consists merely of instructions to members to stay out of trouble and relates to the general strike, not the one day's picketing herein considered.

This is the type of farfetched expert inference not based on evidence that has been condemned repeatedly

by courts. That there was no violence during the twelve-week general strike should rebut such an inference. However the testimony of Vitko on cross-examination destroys the basis for the inference, and the explanation on cross-examination of why Jones made the statement, should have caused an entirely opposite inference to have been drawn.

The second "fact" relied on by the Trial Examiner was that Vitko claimed that on the morning of the picketing, three individuals arrived near the warehouse with Jones, in Jones' "two-tone Pontiac or Chevrolet." Jones testified that one man rode with him, a person named Hilow, that his car was a solid green Pontiac (R. 194), and that two Local officers, named Schendel and Petho, arrived in another car or cars at about the same time. Schendel testified that only Hilow arrived with Jones. The Trial Examiner had to discredit Jones and Schendel in order to make his finding. The testimony of both Jones and Schendel was clear and straightforward (R. 279, R. 309). Yet the Trial Examiner held as a "fact" that there were two "strangers" with Jones. He eliminates Jones' testimony on this point by "doubting" his testimony (R. 41), although it is obvious the General Counsel easily could have ascertained the color of Jones' car so as to test credibility. And Vitko testified not once, but several times that "Jones' car" was two-tone in color. But on this easily-ascertained fact, the Trial Examiner accepted Vitko's testimony without question.

Then the Trial Examiner summarily disposes of Schendel's testimony as follows:

> "Schendel's direct testimony attempting to corroborate Jones' statement that only Hilow and Jones got out of the latter's car was completely discredited by the substance of his cross-examination and his demeanor while testifying." (R. 41, footnote 6.)

This point defies analysis because the Trial Examiner states as a fact something that is not true, i.e., that Schendel "was completely discredited by the substance of his cross-examination." Schendel was not discredited; his testimony corroborated that of Jones on this point and was contradicted only by Vitko. Ordinarily, this issue would be one of credibility, but not when the Trial Examiner (1) predicates a finding on his own false statement, (2) ignores contradictions within the General Counsel's power to solve, (3) "completely" accepts Vitko's testimony and (4) "completely" rejects Jones' testimony, when at every conflict of testimony between the two, Jones is corroborated and Vitko is not.

The third of the "facts" was that the assailant was a picket. The Trial Examiner says—"A picket line was then established with two men, including the man who later assaulted Vitko, carrying signs reading * * *" (R. 41). *There is no such evidence!*

Vitko testified he saw the assailant pick up and carry a picket sign a few feet on the way to where the picket line was to be set up, but that the assailant was not on the picket line (R. 95). So no one said the assailant was a picket, and any inference or finding that he was is not based on evidence.

The fourth of the "facts" is also preposterous. The Trial Examiner says in his finding of fact that the assailant "and the other two passengers in Jones' car began bumping and jostling Vitko between them." (R. 45.) Vitko testified only that Jones alone "bumped me, nudged me" until Vitko told him to stop (R. 94). This is all the testimony on this point except Jones' flat denial (R. 310). Yet the Trial Examiner finds the assailant to have jostled Vitko. He demonstrates why he made this finding in his "legal" finding (Appendix III, p. 31), where he says:

> "It has previously been found that the assailant was engaged by Jones, was brought to the scene of the picketing by him and engaged in the jostling and pushing of Vitko only a short time before the violent assault *without reprimand or repudiation by Jones.*" (Emphasis ours.)

In other words, the Trial Examiner felt it necessary to make a finding of fact that the assailant and Jones together jostled Vitko so as to have a basis for later finding that as a matter of law, the assailant was an agent of Jones.

The entire finding of agency is in the one sentence quoted above. In it, the Trial Examiner combines four fallacious "facts" to support each other to form a "legal finding" as follows:

(1) "It has previously been found that the assailant was engaged by Jones."

This "previous finding" (R. 46) is based on the two following findings! One is that Jones and the assailant arrived together and the second is that the assailant and Jones jostled Vitko between them.

(2) "* * * [the assailant] was brought to the scene of picketing by [Jones]."

This is based on the Trial Examiner's dissembling of the testimony as shown above.

(3) "* * * [the assailant] engaged in the jostling and pushing of Vitko."

This is based on no evidence at all.

(4) "* * * without reprimand or repudiation by Jones."

The assailant did *not* jostle Vitko and was *not* reprimanded or repudiated therefor and this "proves" agency.

Then this one-sentence finding, composed of four fallacies supporting each other, is added to another fallacy,

the "pattern of conduct established by Jones" five months previously and all five fallacies interdependently and separately become *all* the links in "the chain linking Respondents to the assault" (R. 47, Appendix III, p. 31). Thus is established the finding of law that the assault is legally attributable to the Local.

The entire analysis above demonstrates how the Trial Examiner, knowing that Vitko had filed the decertification petition and was assaulted, deliberately built up support for his finding of agency by adding five fallacious facts, and these five fallacies plus Jones' knowledge of the decertification are the entire bases of the Trial Examiner's finding that the assault was factually and legally attributable to the Local.

2. The Errors.

(a) The standard of review set forth by this Court in the companion cases, *Universal Camera Corporation* and *Pittsburgh Steamship Company, supra,* does not justify a finding like this above. If a Trial Examiner can prejudge a case, actually fabricate "facts," misrepresent and misstate and distort testimony and then base his findings on his own inaccuracies therein, the standard is of no value.

The court below did not apply the standard or misapplied it grossly, when it disregarded the facts and apparently decided that when an anti-union man is beaten near a picket line, that is sufficient evidence to justify holding the union liable.

(b) The court below did not apply the common law of agency to the facts herein. This Court has said, "The actions of one individual member no more bind the union than they bind another individual member, unless there

is proof that the union authorized or ratified the acts in question." *United States vs. White,* 322 U. S. 694. Yet, here a man commits an illegal act and is not shown to be even a member of the union, or under the direction of a union member, or instigated by a union member, but the union is held liable. The Act is being misconstrued in a way directly and detrimentally affecting the public interest when the law of agency regarding union and employer representation in the commission of illegal acts is not applied.

The Fifth Circuit Court of Appeals in 1951 in *N. L. R. B. vs. Russell Manufacturing Company, Inc., supra,* held that two police officers and a private citizen who harassed union representatives were not "agents" of the employer as found by the Board. The court said:

> "If the individual respondents were not agents of the corporate respondents, or did not act in their interest, with their knowledge and consent, expressly or impliedly, then they are not employers or persons acting in the employer's interest within the meaning of the Act, and the Board is powerless to issue an order directed against them.
>
> This Court has held that, in order to become subject to the processes of the Act, the person acting in the interest of the employer, directly or indirectly, must be under his control and direction, or under his orders, or, if his acts are unauthorized, they must come to the knowledge of the employer and receive his approval or ratification, either expressly or impliedly. See *N. L. R. B. vs. Tex-O-Kan Flour Mills,* 122 F. (2d) 433. A person acting in the interest of the employer must be one who in fact and law may properly be termed his agent. The basic inquiry must be as to the control of the principal over the agent, the agent's authority or control over the matter entrusted to him, the agent's acts authorized or unauthorized, and whether those acts came to the knowl-

edge of the principal and received his ratification. The mere fact that the principal has received or enjoyed the benefits of the unauthorized act will not amount to a ratification if he did so in ignorance of the facts.

The three individual respondents were all residents of the community in which the corporate respondents were located. Respondent Alford was employed as a salaried collector of delinquent accounts for a local finance company, and from time to time acted as a police informer and process server. Respondent Horton was Chief of Police, a job which he had occupied for about twenty-seven years. Respondent Mann was a member of the local police department. We cannot find substantial support for the Board's ruling in regard to these individual respondents. The findings and conclusions thereon are based on hearsay, suspicion, and speculation, not on substantial facts and legal evidence. There is no evidence in the record that these individual respondents were employed by the corporate respondents; that they had any authority to act for their corporate respondents, that the corporate respondents had any knowledge of their acts; or that the corporate respondents had any control or authority over the individual respondents."

In the instant case, the assailant was not shown to be an agent of the Local or Jones within the criteria set forth in the *Russell* case. Thus, one circuit court of appeals requires proof of common law agency as to employers, while another circuit court ignores or misapplies the law of agency as to unions. This Court should determine the issue and solve the conflict.

B. The record does not show the Local to be an agent of the District Council and the court below (a) failed to apply the standard set forth in Universal Camera Corporation and Pittsburgh Steamship Company decisions; (b) failed to apply the law of agency and thus issued a decision in conflict with the decision of the District of Columbia Court of Appeals in the Di Giorgio Fruit Corporation case, supra.

1. The Facts.

The record on this portion of the case shows the following.

The District Council is a delegate body composed of fourteen constituent unions. The large unions are in the construction field, so-called "General Painters Locals," the other unions are in "special branches of the trade" (R. 228). They are Art Glass Workers, Glaziers, Wallwashers, and Furniture Finishers. The General Painters Locals are controlled tightly by the District Council, with the Council acting for them in all instances. Each general Painters Local elects business agents of the District Council, who are paid by the Council. The Special Branch Locals appoint and pay their own business agents. Warren Jones is a business agent of Local 725, *not* the District Council (R. 233).

The Special Branch Locals must request strike approval from the District Council, the Cleveland Federation of Labor, and the Painters' International Union (R. 189, 190). In the July 27 strike, the approval was obtained from the District Council merely by a conversation with the Acting Secretary (R. 196).

All of the actions surrounding the picketing of the Company's warehouse were the result of the action of the Executive Board of the Local or the Business Agent of the Local, not of the District Council (R. 355-7).

The Trial Examiner found the Local and the District Council to be jointly liable (R. 47) because (1) the strike of July 27 was called because the Company refused to sign a contract with the Local and District Council (2) the constitution of the International Painters Union provides that District Councils shall "supervise" strikes by a Local (3) Jones asked the Acting Secretary of the District Council to approve the July 27 strike (4) the District Council paid for the picket signs (5) Jones had in other matters acted as agent of the District Council.

The Board upheld this finding and the court below did not upset it.

2. The Errors.

(a) The court below disregarded the facts set forth above and thus did not apply the standard set forth by this Court in the *Universal Camera* and *Pittsburgh Steamship* cases requiring consideration of the entire record and fair judging of the testimony.

(b) The Board and the court below did not apply the law of agency. The Trial Examiner shuffled the facts to show the Local an agent of the District Council and Jones an agent because he was business agent of the Local, and then included that Jones having acted theretofore as an agent of the District Council was now an agent. No authority to commit illegal acts by Jones or the Local for the District Council was shown, no general agency was shown, no authorization, no ratification, and no conduct implying authorization was shown. Without such showing, the law of agency is not applied and the Act is not being administered properly.

By not applying the law of agency, the decision of the court below comes in conflict with the decision of

the District of Columbia Court of Appeals in the *Di Giorgio Fruit Corporation vs. NLRB, supra.* That Court squarely met the issue of agency between a local and international, saying as follows:

> "The constitution of the National Union shows that the basic unit in the organization is the local. Each local has its own officers and its own executive committee. The supreme governing body of the National is a convention composed of delegates elected by the locals. Initiation fees and dues are collected by the local, and designated portions of such collections are forwarded to the National. The locals enter into collective bargaining and contracts negotiated by their representatives are submitted to the 'vote of the membership affected by the contract' and, when approved, are signed by the locals. The constitution (Article X, Section 3) provides that when a dispute arises with an employer all resources must be exhausted by the local; that when the local finds it impossible to settle differences, the local officers shall notify the president of the National, who shall send a National representative to seek a settlement; that if he is unable to settle the matter, a meeting of the local, or the involved portion of the local, shall be called and, if two-thirds of the members affected vote to strike, the members are authorized to stop work, set up picket lines, and take other action necessary to call attention of the public to the issues involved. All those provisions spell out basic responsibility on the part of the local *rather than a subordinate position of agency delegated by the National. The presence of the two National representatives assisting the Local Farm Union in the course of the strike was not sufficient to constitute the local an agent of the National.* If, on the evidence here presented, it were to be held that this local was the agent of the National, *it would be difficult to imagine a local member of the National which would not be such an agent."* (Emphasis ours.)

This decision is clearly in conflict with the instant case insofar as the Local is held to be an agent of the District Council. Upon the evidence herein, the International Union and the Cleveland Federation of Labor could as well have been held principals. This Court should settle this conflict on this important question.

C. The record does not show Jones to be an agent of the District Council and the court below (a) failed to apply the standard set forth in Universal Camera Corporation and Pittsburgh Steamship Company decisions, (b) failed to apply the law of agency, and thus issued a decision in conflict with the decision of the Fifth Circuit in N. L. R. B. vs. Russell Manufacturing Company, Inc., supra.

The Board, although approving it, was not content with the Trial Examiner's holding, but went further and made a special finding that Jones was a direct agent of the District Council. That entire holding was (R. 62):

> "*Moreover, in approving the strike activity undertaken by Jones, the District Council, we find, in effect, delegated authority to him to supervise strike activities on the scene on behalf of the District Council.* Accordingly, even if, as the Respondents contend, Jones was normally not authorized to act as the agent or business representative of the District Council, in the absence of a specific designation for that purpose, we find that there was in this case a specific designation of Jones by the District Council to act as *its representative in supervising the strike.* So far as it appears from the record, it was not contemplated that any other representative of the District Council would be present, nor was any such other representative, in fact, present at the scene of the strike activity, so that the responsibility for supervising the strike ac-

tivity on behalf of the District Council necessarily devolved upon Jones." (Emphasis ours.)

For the Board and the court below to hold that lack of another agent proves Jones an agent of the District Council is proof that this Court's decisions in *Universal Camera* and *Pittsburgh* are not being followed.

This holding of the Board and the court below reveals that the law of agency is not being applied as required by the Act.

This holding is in conflict with the Fifth Circuit Court's decision in *N. L. R. B. vs. Russell Manufacturing Company, Inc., supra,* wherein as set forth above, the law of agency was applied in deciding when persons are agents of an employer for the commission of unfair labor practices and the legislative history of the Act shows the same rule should be applied to unions.

CONCLUSION.

To deny judicial review on the facts set out would have three pernicious and far reaching results:

(a) Trial Examiners, the all-important officials in the Board and other agencies, would be encouraged to use their imagination to bolster their prejudgment instead of being limited to the facts in the record and a premium would be placed on the use of subterfuge to avoid carrying out the decisions of this Court.

(b) Parties to a labor dispute would be encouraged to use agent provocateurs to lay the basis for damage suits, unfair labor practices and criminal actions against the other parties.

(c) All associations of unions would be menaced by illegal actions of persons not within their control.

WHEREFORE, petitioners pray that this petition be granted.

Respectfully submitted,

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APPENDIX I.

The relevant provisions of the National Labor Relations Act as amended are as follows:

Definitions.

Sec. 2. When used in this Act—

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Rights of Employees.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).

Unfair Labor Practice.

Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

PREVENTION OF UNFAIR LABOR PRACTICE.

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by

the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 346 and 347 of Title 28.

APPENDIX II.

Administrative Procedure Act.

"Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(e) Scope of Review. So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error." 60 Stat. 243-244, 5 U. S. C. Sec. 1009(e).

APPENDIX III.

The Trial Examiner's entire finding on the assault on Vitko being legally attributable to the Local is as follows:

"Nor can there be any doubt in law that the assault and the other violative conduct hereinafter found is legally attributable to the Local. No question is or could be raised concerning the authority of Jones to call and conduct the strike on July 27 on behalf of the Local. He admittedly was given full authority to call and conduct the strike as he saw fit and necessary. It has previously been found that the assailant was engaged by Jones, was brought to the scene of picketing by him and engaged in the jostling and pushing of Vitko only a short time before the violent assault, without reprimand or repudiation by Jones. Though the conclusion fixing responsibility for the assault does not rest entirely on express authority, one cannot ignore Jones' instructions to the Local's membership that 'if anything rough * * * comes out of [the picketing, the membership] should just walk out of the picture, our boys that we hire for it will know what to do and how to do it.' In any event, the chain linking Respondents to the assault is not broken, by the fact that the assault was not expressly authorized. 'A principal may be responsible for the act of his agent within the scope of the agent's general authority * * * even though the principal has not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted.' International Longshoremen's and Warehousemen's Union and Sunset Line and Twine Company, 79 NLRB 1487. On the entire record, the liability of the Local for the conduct of the strike and assault on Vitko is clearly established." (R. 46, 47.)

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 781

PAINTERS DISTRICT COUNCIL NO. 6, BROTHERHOOD OF PAINTERS, DECORATORS, AND PAPERHANGERS OF AMERICA, AFL, AND FURNITURE FINISHERS, LOCAL UNION, 725, BROTHERHOOD OF PAINTERS, DECORATORS, AND PAPERHANGERS OF AMERICA, AFL, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below, incorporated in its judgment (R. 363), is not officially reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 33, 56, 61–65) are reported at 97 NLRB 654.

JURISDICTION

The judgment of the court below was entered on March 2, 1953 (R. 363). The petition for a writ of certiorari was filed on May 5, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that petitioner Unions (Local 725 and the District Council) were responsible for acts of restraint or coercion upon employees committed or instigated by Local 725's business representative in the course of a strike and picketing activities, the supervision and conduct of which activities petitioners had assigned to him.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra,* pp. 17–20.

STATEMENT

A. The Board's findings of fact

Following the usual proceedings under the Act, the court below approved the Board's findings that petitioners had, by means of threats and violence, restrained and coerced the employees of the Higbee Company, herein called the Company, in

the exercise of their right to refrain from engaging in union or concerted activities, thereby violating Section 8 (b) (1) (A) of the Act.

The subsidiary facts upon which the Board based its findings are detailed below:

1. Employee Vitko initiates a decertification petition following a long and unsuccessful strike

The Higbee Company operates a warehouse in Cleveland, Ohio, in which it employs a staff of from eight to ten furniture finishers who are members of the Local (R. 37; 175). Following an impasse in bargaining negotiations with the Company, the Local and the District Council conducted a strike from April until July 1950, a period of about 12 weeks (R. 37–38; 137). Shortly before this strike Warren Jones, business representative of the Local, informed the members of the Local in the presence of Ward, the general secretary of the District Council, that in the event of a strike they would be free to picket but that, "if anything comes up * * * if anything rough * * * comes out of it, our boys that we hire * * * will know what to do and how to do it and when to do it" (R. 45; 78). The Company's finishers returned to work on July 11 (R. 39; 138–139, 295).

Shortly after the resumption of work, Charles Vitko, a member of the Local and an employee of the Company, expressed dissatisfaction to the other finishers about their three-month period of

idleness without strike pay or other benefits (R. 39; 71, 79). In the course of his conversations he ascertained that the finishers generally "were pretty well burned up about it * * * and * * * thought [they] got a raw deal" (R. 39; 79).

On July 24, Vitko filed with the Regional Office of the Board at Cleveland a decertification petition, signed by him, for the purpose of terminating the Local's status as bargaining representative of the Company's finishers (R. 40; 80, 81, 83, 331, 332).[1] The next day, July 25, Vitko filed with the Board a supporting statement signed by seven of the eight men then employed in the department (all but the union steward) which recited that they "no longer wished to be represented by the Local" and asked the Board "to conduct an election and decertify this Union" (R. 40; 84, 85, 340).

2. Local business representative Jones threatens employee Galayda with loss of employment for signing the decertification petition

When Warren Jones, business representative of the Local, heard, on July 26, that Vitko had filed the decertification petition he interrogated

[1] The Act provides in Section 9 (c) (1) that "Whenever a petition shall have been filed * * * (A) by an employee or group of employees * * * (ii) assert[ing] that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative [of a majority of the employees] * * * the Board shall investigate such petition * * * direct an election * * * and shall certify the results thereof."

a number of the employees to determine if they had signed the petition (R. 40; 230, 231, 237, 238). On receiving an affirmative reply from Galayda, Jones replied, "You dirty rat. You ain't going to get a job in the whole city of Cleveland" (R. 40; 231).

Jones also told Galayda, Orz, and Walter Nelson, the Union steward, that a picket line would be placed about the warehouse the following morning (R. 40; 231, 238, 307). When Jones told Orz that he (Orz) couldn't come to work the next day, Orz replied that he "would like to see that," to which Jones retorted: "All right, we are going to show you" (R. 40, 238). Jones then consulted with the agent of the District Council, and they decided to call a strike and picket the warehouse (R. 47, 62; 196).

3. The assault on Vitko

Aware that a picket line would be established on July 27, Vitko arrived at the warehouse earlier than usual on that day, at about 6:30 a. m. (R. 40; 90). He obtained his orders and assignments and then went out to get his automobile preparatory to making his service calls (R. 40; 92). At this time Jones arrived in his car, accompanied by three men, and parked in front of Vitko's car (R. 40; 92). Petho, Local president, in company with Schendel, Local treasurer, arrived almost simultaneously (R. 40–41; 92–93). Approaching Vitko, Jones asked him, "Are you the one that

done it?" Vitko said, "Yes" (R. 41; 93). At this Jones ordered Vitko not to get into his car or go into the warehouse (R. 41; 94).

Vitko began walking toward the warehouse entrance with Jones on one side of him and Jones' three passengers on the other side when Jones began pushing and jostling him (R. 41; 94). Vitko protested to Jones with the result that one of Jones' companions, who was carrying a picket sign, replied that, "Jones isn't pushing you around. It is you pushing Jones" (R. 41; 94). It was this individual, whom Vitko described as being a short, dark-complexioned man of medium stature with a scar on his face, who later assaulted Vitko (R. 41–42; 95). Shortly after this pushing incident Jones got into his car, which was parked in front of Vitko's, and backed it up directly against Vitko's so that the latter car could not be moved (R. 41; 97). At about this time a picket line was established in front of the warehouse with two men carrying signs reading "ON STRIKE, FURNITURE FINISHERS LOCAL 725 A. F. of L. AFFILIATED PAINTERS D. C. #6, CLEVELAND FEDERATION OF LABOR" (R. 41; 343).

A few minutes before 7 a. m. Vitko left the warehouse (R. 41; 97–98). On his return, about 7 a. m., he saw coming toward him the scar-faced man whom he had encountered earlier. Vitko changed his direction to avoid any further encounter, but the scar-faced man kept coming

toward him (R. 41; 98–99). As they met, about 50 to 75 feet from Main Avenue, but out of view of the picket line and the two policemen stationed there, the stranger asked Vitko why he was "picking on him" (R. 41–42; 99, 257, 260). Vitko replied, "I don't even know you, let alone picking on you" (R. 41–42; 99). The stranger then struck Vitko in the face with such force that Vitko was knocked to the ground. As he attempted to rise the stranger delivered a violent blow to the back of his head (R. 42; 99). While regaining his feet, Vitko saw his assailant running up the hill on Main Avenue, followed by an automobile which was being driven by one of the other three men Vitko had seen arriving with Jones earlier in the morning (R. 42; 100). A policeman who had been at the warehouse entrance and had heard of the assault went toward the field where Vitko was attacked and found Vitko "staggering in the street" (R. 42; 100, 256–257). Vitko was, in the words of the police officer, "too ill to speak to me" (R. 257). Shortly thereafter Vitko lost consciousness and was taken by ambulance to a hospital. Several hours later he was taken by cab from the hospital to his home where he remained for a month under the care of a physician (R. 42; 100–101).

4. Jones threatens other employees with physical violence

During the same morning (July 27), several other finishers arrived at the warehouse prepared

to work (R. 42; 231, 238–239, 263). Jones approached finishers Orz and Kazawal individually and told them "You better not go in if you know what's good for you" (R. 42; 238, 263).

During the noon hour this day, Jones obtained from five of the men who signed the affidavits supporting the decertification petition their signatures to affidavits, previously prepared under Jones' direction, stating that the affiant did not want the Local decertified (R. 42; 231–232, 239–240, 264, 313, 314, 315). Prior to the signing, Jones, in the presence of the other men, some of whom knew of the assault on Vitko, told Orz, "you better sign * * * if you know what's good for you" (R. 42–43; 239, 253). Galayda, a man of limited understanding, said he didn't "know what the paper said" and that he only signed "to get rid of them [pickets] from the warehouse there" (R. 42–43: 232). Orz said he signed the affidavit to avoid trouble (R. 43; 240). Within a few minutes of the signing Jones called Eerkes, Vice President of the Company, and told him that the men had been to the Board and withdrawn their decertification petition and that the picket line had been removed (R. 43; 148).

5. The role of petitioner District Council in these activities

For a number of years an employers' group called The Cleveland Retail Furniture Association, of which the Higbee Company was a member, had entered into collective bargaining con-

tracts with the Local covering furniture finishers in the employ of members of the group (R. 37; 183–184). The negotiations were carried on in behalf of the furniture finishers by representatives of both the Local and the District Council, and the District Council was also a signatory to these contracts (R. 38; 290–293, 350). Thus the District Council, as well as the Local, had an interest in avoiding any termination of bargaining relations, such as that sought by the employees supporting the decertification petition.

In actual practice the District Council and the Local worked very closely in planning strike strategy as well as in conducting negotiations on behalf of the furniture finishers. Prior to the calling of the April strike, Ward, the general secretary of the Council, participated in the pre-strike union meetings (R. 75–77). Ward was present at the last meeting preceding the calling of the strike at which business representative Jones cautioned the men against themselves engaging in "anything rough," explaining that "our boys that we hire for it will know what to do and how to do it and when to do it" (*supra*, p. 3). After Jones finished speaking at this meeting, Ward himself warned the men that "Any son-of-a-bitch that I catch scabbing, it's going to be too bad" (R. 78). Similarly, when the men reported to the union hall to inquire about returning to work, they consulted first with Ward, the general

secretary of the Council, and then with Jones; it was Ward who actually made the arrangements with the Company concerning the return of the men to work (R. 235–236, 294–295).

The cooperation between the Local and the District Council in connection with strikes accords with the constitutional requirement of the Brotherhood of Painters, Decorators, and Paperhangers of America, AFL, that where District Councils exist "strikes and lockouts shall be under their supervision" (R. 47, 62; 222, 351). In conformity with this requirement business representative Jones, prior to calling the July 27 strike, saw Joseph Montvica, in charge of the District Council in the absence of Ward, the general secretary, and discussed with him the question of what action should be taken against the Company. Montvica agreed that Jones' plan to strike and picket was a "wise one" and he granted Jones permission to proceed (R. 47, 62; 196). Jones had on July 25 been given full authority by the Executive Board of the Local to call and conduct a strike at the Higbee Company as he saw fit (R. 46; 203). Ward, the general secretary of the District Council, testified that the regular procedure with respect to the July 27 strike was followed by Jones (R. 47; 222, 223–224). Jones ordered the signs that were carried by the pickets, and they were paid for with funds provided by the District Council (R. 45, n. 15;

210).[2] Jones was in full charge of the picketing and strike activities, and the officers of the Local were subject to his control (R. 46; 193). Jones had, on prior occasions, been designated by the District Council to act as its representative for particular purposes (R. 47–48, 63; 179–180).

B. The Board's conclusions and order

On evidence summarized above, the Board found that union business representative Jones, by threatening the finishers to coerce them to support the union, by jostling employee Vitko and by instigating the assault upon him because he had initiated proceedings to decertify the Local, had interfered with, restrained, and coerced the employees in the exercise of the right guaranteed to them by Section 7 of the Act to engage in or refrain from engaging in union or concerted activities (R. 43–49). The Board further found that Jones, in thus interfering with the rights of the employees, was acting pursuant to the authority conferred upon him by petitioner Local 725 to call and conduct the strike activity, and "the Local was therefore properly chargeable with his acts and statements" (R. 62). Petitioner District Council was also found to be responsible for this conduct, for the relationship between the District Council and Local 725 established that

[2] Before the April 17 strike the District Council pledged its "financial * * * and moral assistance" to the Local (R. 47, n. 18; 190).

the two Unions were engaged in a "joint venture" with respect to the strike (R. 48) and "there was in this case a specific designation of Jones by the District Council to act as its representative in supervising the strike" (R. 62–63). Accordingly, the Board concluded that petitioners Local 725 and the District Council, by their agent Jones, had restrained and coerced employee Vitko and the other finishers at the warehouse in the exercise of rights guaranteed by Section 7 of the Act, thereby violating Section 8 (b) (1) (A) of the Act (R. 62–63).

C. Judgment of the court below

The Board ordered (R. 63–65) petitioners to cease and desist from restraining and coercing the employees of Higbee Company in the exercise of rights guaranteed by Section 7 of the Act, by threats of reprisal, by acts of violence, or in any other manner. Affirmatively the Board's order requires petitioners to post appropriate notices at their business offices, and to sign and mail sufficient copies of the notices for posting at the Company warehouse.

The court of appeals, without opinion, approved the findings and conclusions of the Board, and decreed that the Board's order be enforced in full (R. 363). The court's order recites that the court was (R. 363) "of the opinion that the findings of the Board with respect to the questions of fact are supported by substantial evidence on the record considered as a whole."

ARGUMENT

Petitioners assert (Pet. 18–20, 22–25) that the Board and the court below, in concluding that the Local was chargeable with the assault on Vitko[3] and that the District Council was also chargeable with the acts of restraint and coercion found by the Board to have been committed or instigated by Jones during the course of the strike activity, failed to apply or misapplied the controlling law of agency which Section 2 (13) of the Act incorporates in the statute. This contention is without merit.

[3] Petitioner Local apparently does not disclaim responsibility for the other acts of restraint and coercion committed by its business agent Jones, i. e., the pushing and jostling of employee Vitko by Jones and other union pickets who accompanied Jones and Jones' threats of reprisals against various employees if they did not support the Local (*supra*, pp. 4–8). Although petitioners specify as error, but "only for saving purposes if this writ is granted," the Board's findings that these incidents were violative of the Act (Pet. 5), there can be no serious doubt as to the propriety of these findings. *National Labor Relations Board* v. *United Mine Workers, District 2*, 202 F. 2d 177 (C. A. 3); *National Labor Relations Board* v. *United Mine Workers, District 31*, 198 F. 2d 389, 390 (C. A. 4), enforcing 95 NLRB 546, certiorari denied, 344 U. S. 884; *National Labor Relations Board* v. *United Construction Workers*, 198 F. 2d 391, 392 (C. A. 4), enforcing 94 NLRB 1731, certiorari denied, 344 U. S. 876; *National Labor Relations Board* v. *United Mine Workers, District 31*, 190 F. 2d 251 (C. A. 4); *National Labor Relations Board* v. *United Mine Workers, District 23*, 195 F. 2d 961 (C. A. 6), certiorari denied, 344 U. S. 920; *Progressive Mine Workers* v. *National Labor Relations Board*, 187 F. 2d 298, 300–301 (C. A. 7); *Lane* v. *National Labor Relations Board*, 186 F. 2d 671, 674 (C. A. 10).

It is a familiar rule of agency law that a principal is responsible for the acts of his agent in furtherance of the principal's interest and within the scope of the agent's general authority. *Restatement of Law, Agency,* Secs. 219, 228, 233–234; *Tiffany on Agency* (2d ed., 1924) p. 105, Sec. 38; Mechem, *Outline of Agency* (3d ed., 1923) Secs. 526–528. As the evidence summarized above establishes (pp. 8–11), and the Board found, both the Local and the District Council designated the Local's business agent, Jones, to call and conduct the strike and picketing activities in order to maintain the Local's status as bargaining representative, to supervise these activities on their behalf and to take such steps as were necessary to make them effective.

In furtherance of this purpose Jones threatened various employees with reprisals if they failed to support the Local (*supra,* pp. 4–5, 7–8). The circumstances surrounding the assault on Vitko (*supra,* pp. 5–7) cogently established, as the Board found (R. 46–47, 61–62), that it was instigated by Jones to punish Vitko for having initiated the decertification proceedings in order to unseat the Local as bargaining representative. The misconduct engaged in by Jones or instigated by him plainly was in furtherance of the purpose of the strike and picketing activities, the supervision of which had been turned over to him by petitioners. In these circumstances, the Board and the court below, consistent with established rules of agency,

could properly find, as they did, that there was sufficient evidence in the record to attribute to the Local and the District Council the misconduct of Jones. That the particular acts of restraint or coercion may not have been specifically authorized or sanctioned by petitioners does not impair the validity of this conclusion, for in the language of the Act, "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." Section 2 (13).[4]

Essentially, petitioners' contention is that substantial evidence does not support the Board's finding, approved by the court below, that the misconduct found to be violative of Section 8 (b) (1) (A) is attributable to petitioners. We submit that there is no occasion for further consideration of the sufficiency of the evidence by this Court, for, save in exceptional circumstances not present here, that is "a question which Congress has placed in the keeping of the Courts of Appeals." *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 491; *National Labor Relations Board* v. *American National Insurance Co.,* 343 U. S. 395, 409–410.

[4] This provision has the effect of making the more stringent limitations of Section 6 of the Norris-LaGuardia Act (29 U. S. C. 106) inapplicable. See statement of Senator Taft quoted on page 7 of the petition.

No conflict exists, as petitioners assert (Pet. pp. 19, 23) between the decision here and the decision in *National Labor Relations Board* v. *Russell Mfg. Co.*, 187 F. 2d 296 (C. A. 5), or in *Di Giorgio Fruit Corp.* v. *National Labor Relations Board*, 191 F. 2d 642 (C. A. D. C.), certiorari denied, 342 U. S. 869. The most that can be said of the cases relied on by petitioners in support of their claim of conflict is that the courts in those cases reached a different result on quite a different set of facts.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;* * *

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

(c) (1) Whenever a petition shall have been filed, * * *

(A) by an employee or group of employees * * * (ii) assert[ing] that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative [of a majority of the employees]

* * * * *

the Board shall investigate such petition * * * direct an election * * * and shall certify the results thereof.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the

Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence

on the record considered as a whole shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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